***UNITED STATES DISTRICT COURT***

***DISTRICT OF MAINE***

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| ***WILLIAM S. HAMILTON,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Civil No. 98-58-P-H*** |
| | ***)*** | |
| ***NORTH AMERICAN MORTGAGE*** | ***)*** | |
| ***COMPANY, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Defendants*** | ***)*** | |

***RECOMMENDED DECISION ON CLASS CERTIFICATION***

The plaintiff moved to amend the scheduling order in this case arising under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq*., and the defendants moved to bifurcate discovery, seeking to isolate the issue of potential class certification sought by the terms of the plaintiff's complaint. Because the contemplated discovery concerning potential class members would be extensive and time-consuming, and therefore very costly, after discussion with counsel I directed the parties to file memoranda of law addressing the following issue:

> Assuming, *arguendo*, that the plaintiff can satisfy all of the requirements of Fed. R. Civ. P. 23(a) and that discovery involving a statistically relevant sampling of all of the transactions implicated in this class-action lawsuit would reveal that in a significant number of those transactions (i) the yield spread premium that was paid by the lender to the broker was determined by the interest rate of the loan, and not by the provision of any services, (ii) the loan at issue was table-funded by the lender, so there was no sale of goods by the broker to the lender, (iii) the compensation by the borrower to the broker was intended to compensate the broker fully for the work it did for the borrower, and (iv) the broker received a yield spread premium from the lender only when it originated an above-par loan, not when it merely

> originated any loan, is this an appropriate case for class certification under either Fed. R. Civ. P. 23(b)(2) or (3)?

Report of Conferences of Counsel and Order (Docket No. 9) at 2. The parties have now submitted their memoranda on this issue[1] and I conclude that the case is not appropriate for class certification. If the court adopts my recommended decision, an amended scheduling order will promptly issue.

## I. Applicable Legal Standards

Fed. R. Civ. P. 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual member of the class would create a risk of
>
> > (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only

[1] The plaintiff has requested oral argument on this issue. Docket No. 13. In my opinion, the written submissions of the parties are sufficient for fully and fairly resolving the issue raised. Therefore, the request for oral argument is denied.

> individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Class certification is a matter committed to the discretion of the district court. *Dionne v. Bouley*, 757 F.2d 1344, 1355 (1st Cir. 1985). However, the court must undertake a "rigorous analysis" to assure that the requirements of the rule are met. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The burden is on the plaintiff to establish that class certification is appropriate. *Id*. at 157-58.

The complaint in this action alleges that defendant North American Mortgage Company ("North American") made payments to defendant CrossLand Mortgage Corporation ("CrossLand") that were "kickbacks made solely for steering Plaintiff and the class members to [North American] for loans at interest rates and point charges higher than those [North American] otherwise would have required on their loans." Complaint (Docket No. 1) ¶ 2. The plaintiff alleges that North American "did not pay the mortgage brokers (including Cross[L]and) for any actual services rendered" and that CrossLand "did not receive the unlawful payments from mortgage lenders for actual services rendered." *Id*. While the complaint alleges violation of unspecified "state unfair and deceptive acts and practices statutes," *id*. ¶ 43, its only claims for relief are asserted under RESPA, specifically alleged violation of 12 U.S.C. § 2607 and 24 C.F.R. § 3500.14 (apparently sometimes referred to as "Regulation X"), *id*. ¶¶ 67-74.

The statute invoked by the complaint provides, in pertinent part:

> **(a) Business referrals**
>
> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> **(b) Splitting charges**
>
> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.
>
> **(c) Fees, salaries, compensation, or other payments**
>
> Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed . . . .
>
> **(d) Penalties for violation; joint and several liability; treble damages; . . . costs and attorney fees . . . .**
>
> * * *
>
> **(2)** Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.
>
> * * *
>
> **(5)** In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

12 U.S.C. § 2607. The parties appear to agree that the plaintiff's mortgage loan was federally related within the meaning of the statute. The term "settlement services" is defined to include

> any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the

processing, and closing or settlement . . . .

12 U.S.C. § 2602(3).

Regulation X provides, *inter alia*, that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c). In addition, "[a]n agreement or understanding for the referral ob business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct." *Id*. § 3500.14(e). Exempted from the prohibitions of the regulation is "[a] payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan" and "[a] payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." *Id*. § 3500.14(g)(1)(iii) & (iv).

## II. Background

The plaintiff, a resident of Rhode Island, alleges that he engaged CrossLand to obtain a mortgage loan for him and that he agreed to pay CrossLand $310, which represented .25% of the principal amount of the loan he sought, for its services. Complaint ¶¶ 4, 19, 21. According to the complaint, CrossLand "purported" to act as the lender for the plaintiff's loan, but the loan funds were actually supplied by North American. *Id*. ¶ 20. The parties agree that the plaintiff's loan was "table-funded" — that is, the loan was made in the name of CrossLand and immediately after closing was assigned to North American, which provided the loan funds — and that North American paid CrossLand $930, or .75% of the principal amount of the loan, upon the closing of the loan transaction. The defendants refer to this payment as a "yield spread premium," Defendants' Memorandum of Law

in Opposition to Class Certification ("Defendants' Memorandum") (Docket No. 17) at [1], a term often used in the case law relevant to the issue currently before this court. In addition to the $310 loan origination fee paid to CrossLand, the plaintiff was charged $410 for other fees at the closing. Complaint ¶ 21.

The plaintiff seeks certification of two plaintiff classes: (1) the lender class, to include all persons in the United States who entered into a residential mortgage transaction on or after March 4, 1998, documented as a RESPA transaction and in which North American provided funds for the loan or was assigned the loan within two weeks before or after the closing date, and separate payments were made to the mortgage broker by the borrower and North American, and (2) the broker class, to include all persons in the United States who entered into a residential mortgage transaction on or after March 4, 1998 similarly documented and in which CrossLand was the mortgage broker or assigned a loan to a mortgage lender within two weeks before or after closing and separate payments were made to CrossLand by the borrower and the lender. *Id*. ¶¶ 46-47. The complaint asserts that membership in each class exceeds 1,000. *Id*. ¶¶ 48, 54. The plaintiff seeks certification of these classes under both Fed. R. Civ. P. 23(b)(2) and (b)(3).

The complaint seeks treble damages, attorney fees, expenses and costs, and declaratory and injunctive relief ("an order declaring Defendants have acted in violation of RESPA and enjoining them from continuing to act in a way violative of the law as complained of herein"). Complaint at 17.

## III. Discussion

Much of the case law discussing requests for class certification where claims of violation of 12 U.S.C. § 2607 by the payment of yield spread premiums are raised is unreported, a fact that has not

prevented the parties from bringing each such opinion to the court's attention. This court is constrained by the directive of the First Circuit Court of Appeals that unpublished opinions "are never to be cited in unrelated cases." *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988). *See also People's Heritage Sav. Bank v. Recoll Management, Inc.*, 814 F. Supp. 159, 163 n.8 (D. Me. 1993). It is perhaps for this reason that both the plaintiff and the defendants argue vigorously that *Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998) ("Culpepper I"), and the Eleventh Circuit's supplemental clarification of that decision, *Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717 (11th Cir. 1998) ("Culpepper II"), support their respective positions on this issue. In fact, neither *Culpepper* decision necessarily supports either position.[2]

In *Culpepper I*, the Eleventh Circuit reversed a district court's grant of summary judgment to the defendant mortgage broker on a claim that its receipt of a yield spread premium on a table-funded loan violated RESPA, specifically section 2607. 132 F.3d at 694-97. The court held that, under the factual circumstances presented in the summary judgment record, the yield spread premium violated RESPA. *Id.* at 697. In *Culpepper II*, the court noted that a yield spread premium could be lawful in certain circumstances and that the defendant was not prevented from attempting to prove its case at trial. 144 F.3d at 718-19. "The only issue decided by the court was whether as a matter of law [the broker] had proven in the instant record that this yield spread premium for this table-funded loan was a payment for goods or services and therefore not a prohibited referral fee." *Id.* at 718. The plaintiff's

[2] The plaintiff cannot seriously contend, as asserted at page 17 of his memorandum, Plaintiff's Memorandum of Law in Support of Class Certification ("Plaintiff's Memorandum") (Docket No. 12), that *Culpepper I* "supercede[s]" two opinions of the federal district court in Massachusetts, one of which is reported. As a procedural matter, a decision of the Eleventh Circuit binds only the district courts in that circuit. In a substantive sense, the *Culpepper* decisions do not address class certification.

request for class certification, which had been delayed at the defendant's request by the district court pending resolution of the motion for summary judgment, was to be considered by the district court on remand. *Culpepper I*, 132 F.3d at 697.

The plaintiff essentially asks this court to find, relying on *Culpepper I*, that the yield spread premiums paid to CrossLand by North American were not bona fide payments intended to compensate CrossLand for services actually performed and that class certification is therefore appropriate because "all of [the] lender's arguments against class certification necessarily are rendered unpersuasive" by such a factual finding. Plaintiff's Memorandum at 7-8 & n.7. This approach puts the cart before the horse. The only issue before the court at this time is certification of the two classes sought by the plaintiff under the assumptions set forth in the July 30 order. Determination of a disputed factual issue based on the allegations of the pleadings would be inappropriate. Even the Eleventh Circuit gave the broker defendant in *Culpepper* an opportunity to prove at trial that its yield spread premiums did not violate RESPA, while noting that the undisputed facts presented on summary judgment presented the defendant with a "hurdle" to overcome in doing so. *Culpepper II*, 143 F.3d at 719. Contrary to the plaintiff's position, the assumptions upon which the parties were directed to submit their memoranda on the issue of class certification do not mandate a finding that a violation of RESPA has occurred.

The courts in the only reported cases addressing the class certification issue presented here have denied certification. *Marinaccio v. Barnett Banks, Inc.*, 176 F.R.D. 104, 109 (S.D.N.Y. 1997); *Moniz v. CrossLand Mortgage Corp.*, 175 F.R.D. 1, 4 (D. Mass. 1997); *Sicinski v. Reliance Funding Corp.*, 82 F.R.D. 730, 734 (S.D.N.Y. 1979). Noting that all of these decisions were issued before *Culpepper I*, the plaintiff argues that they were wrongly decided. *Sicinski* is of little value here because it did not involve a yield spread premium and the decision to deny certification of a putative

class of 303 was based in large part upon the court's finding that the plaintiff's claim was subject to defenses that would unnecessarily prejudice the class's chance of success and that the plaintiff's counsel would not adequately represent the interests of the class. 82 F.R.D. at 732-34. In both *Moniz* and *Marinaccio*, however, the courts faced factual situations very similar to that presented here. In both cases, the decision to deny class certification is based upon a finding that the broker is entitled under RESPA to earn his compensation from both the lender and the borrower, and that so long as the total compensation is reasonable, no violation of RESPA has occurred. 176 F.R.D. at 108; 175 F.R.D. at 4. Therefore, these courts reasoned, each putative class member's factual situation must be scrutinized separately, and individual factors predominate over common issues, making Rule 23(b)(3) certification unavailable. *Id*.

The plaintiff contends that these courts erred in failing to appreciate that section 2607 requires a two-pronged analysis. If the plaintiff can prove that the yield spread premium was paid for no services, goods or facilities at all, he suggests, the question of the reasonableness of the total amount received by the broker will never arise. Therefore, he concludes, all he must do is allege in his complaint that the yield spread premium was not paid for any services, goods or facilities, and he is entitled to class certification.[3] The *Marinaccio* court rejected this argument. 176 F.R.D. at 108. Three

[3] This argument clearly does not succeed with respect to Count II of the complaint, which alleges that section 2607 was violated because the yield spread premiums received by CrossLand from North American were duplicate payments for services already paid for by the plaintiff and members of the putative class. Complaint ¶¶ 71-74. There is no way in which it would not be necessary to conduct a case-by-case inquiry of the reasonableness of any particular yield spread premium in this scenario. Individual issues would necessarily predominate in the putative class as to Count II of the complaint, and the plaintiff would not be entitled to certification of either class under Rule 23(b)(3) as to Count II.

unreported decisions of federal district courts issued since *Culpepper I* have adopted it,[4] and eight unreported decisions of federal district courts issued in the same time period have denied class certification. All of these decisions discuss certification under Rule 23(b)(3).

The contentions underlying the plaintiff's request for Rule 23(b)(3) class certification are not directly relevant to his request for certification under Rule 23(b)(2), presented in his memorandum of law almost as an afterthought. Because the requirements for Rule 23(b)(2) certification can be discussed separately and much more briefly than those of Rule 23(b)(3) under the circumstances of this case, I will turn to the Rule 23(b)(2) issue at this point. A basic requirement of class certification under Rule 23(b)(2) is that the demand for relief be primarily for declaratory or injunctive relief. *In re School Asbestos Litigation*, 789 F.2d 996, 1008 (3d Cir. 1986). Here, while the complaint seeks such relief, the plaintiff's primary demand is clearly for monetary relief, including treble damages and attorney fees and costs. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("[M]onetary relief 'predominates' under Rule 23(b)(2) when . . . the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each potential class member's case."). Accordingly, certification under Rule 23(b)(2) is not appropriate. *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 500 (D. Md. 1998) (although suit seeks declaratory relief for whole class, gravamen of complaint is prayer for monetary relief; Rule 23(b)(2) certification denied).

Rule 23(b)(3) is the appropriate subsection of the rule for the claims made in the complaint. The plaintiff contends that he is entitled to certification of both putative classes under this subsection

[4] The plaintiff also relies on one other unreported decision that is not even available on the Westlaw or Lexis services and that predates *Culpepper I*, *McDermott v. Mercury Capital Svcs., Inc.*, Docket No. 1:94-cv-1524-MHS, Order dated July 12, 1995 (N.D.Ga.). Even if I were allowed by the First Circuit to consider this opinion, it is totally conclusory and of no value in consideration of the issues raised in the case at hand.

because he has alleged that CrossLand performed no services in return for the yield spread premium paid to it by North American. One of the three unreported decisions cited by the plaintiff in support of his position, *Rendler v. Gambone Bros. Dev. Co.*, 1998 WL 328197 (E.D.Pa. June 18, 1998), grants a motion for class certification on a conclusory basis, without discussion of the plaintiff's theory or the case law to the contrary. *Id*. at *7. The plaintiff's two-step theory is adopted in *Mulligan v. Choice Mortgage Corp*., 1998 WL 544431 at *5 (D.N.H. Aug. 11, 1998) (no discussion of contrary authority), and *Brancheau v. Residential Mortgage & Mercantile Bank*, 1998 U.S. Dist. Lexis 14439 (D. Minn. Sept. 4, 1998).[5]

I have considered the rationale provided by the judges in these two decisions and find it unpersuasive. Granted, if the plaintiff can prove at trial that no services were performed by CrossLand in return for the yield spread premiums paid to it by North American in each of the more than 2000 loans whose recipients constitute the putative classes, it will not be necessary to conduct a case-by-case reasonableness inquiry for each yield spread premium. However, if the plaintiff cannot prove that fact at trial, the reasonableness inquiry will be necessary. Accordingly, pre-trial discovery concerning reasonableness will have to be undertaken in any event. The plaintiff has not suggested that he is seeking to bifurcate trial in any manner. The *Brancheau* court addressed class certification at the same time as the parties' motions for summary judgment were presented. That situation presents a very different question in terms of procedure and substance than does a motion for class certification brought before discovery has begun. The court may not assume, at this early stage, that an inquiry into

[5] An unreported decision by another judge in the District of Minnesota reaches the opposite conclusion. *Schmitz v. Aegis Mortgage Corp*., Docket No. 97-2142 (DSD/JMM), Order dated August 3, 1998) (D. Minn.) (copy attached as Exhibit B to Declaration of R. Bruce Allensworth, Docket No. 16).

reasonableness under RESPA will not be necessary merely because the plaintiff has alleged, in the alternative, that the yield spread premiums at issue were not paid in return for any services, goods, or facilities.

The assumptions presented to the parties by my July 30 order did not include an assumption that the yield spread premiums could not have reflected reasonable compensation for services rendered by CrossLand. The plaintiff's assertion that the court's assumptions that the *borrower* intended his payment to the broker to compensate the broker in full for services to the *borrower* and that the yield spread premium was paid only on an above-par loan require the conclusion that the yield spread premium could not have been payment for services rendered by the broker to the lender reads too much into those assumptions. Even if the plaintiff were to determine from the extensive class-certification discovery that it seeks the information most favorable to its position, as represented by the assumptions upon which the parties were directed to submit their memoranda on this issue, I nevertheless conclude that class certification would not be appropriate under Rule 23(b)(3) because questions regarding individual members of the class would predominate over questions common to the class, due to the necessity of determining in each case whether services were provided to North American by CrossLand and the reasonableness of the compensation for those services. *Moniz*, 175 F.R.D. at 4; *Marinaccio*, 176 F.R.D. at 108.

## IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's request for class certification be **DENIED**. I also recommend that the defendant's motion to bifurcate discovery be denied as moot.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 5th day of October, 1998.***

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***David M. Cohen***
***United States Magistrate Judge***